85-1789

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JEFFREY R. HUNTER,
Private First Class, United States Army,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

WHETHER it is harmless error to deny petitioner the basic right to confrontation against the principal government witness where extrinsic evidence indicative of a motive to lie was prohibited and the witness invoked his right against self-incrimination during cross-examination.

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v.

THE UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Jeffrey R. Hunter, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 21 M.J. 240 (CMA 1986) (Appendix A). The opinion of the Army Court of Military Review is reported at 17 M.J. 738 (ACMR 1983) (Appendix B).

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on January 27, 1986, affirming petitioner's conviction of February 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."
>
> Amendment V: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Contrary to his pleas, the petitioner was convicted of possession, transfer and sale of marijuana based on transactions occurring on September 30 and October 4, 1981. The government's case relied principally upon the testimony of Specialist Four Jones, a confidential informant.

On September 25, Jones met with petitioner at a military police picnic at Fort Benning, Georgia. Jones testified that he gave petitioner $45.00 supplied by Army investigators for marijuana to be delivered later that day (R. 287). A witness to the transaction testified she saw only $40.00 transferred (R. 230), which was consistent with petitioner's later remarks to his roommate, Specialist Browning (R. 195, 207). Jones was not searched by Army investigators after the transfer of funds (R. 255).

Jones did not receive any drugs that day, and did not have any contact with petitioner until September 29, when he met with Browning and petitioner (R. 245, 275). After Jones rejected petitioner's offer to return the money (R. 356), petitioner assured Jones that the drugs would be delivered the next day. Ultimately, Browning and petitioner delivered 28 grams of marijuana to Jones on September 30. The Army investigator on the case was not present and when he arrived a few hours later (R. 246, 311), Jones turned over 23.35 grams of marijuana (Prosecution Exhibit 9).

On October 4, Army investigators searched Jones and his car and issued him $15.00 to purchase marijuana. Jones then entered petitioner's trailer. Petitioner took $10.00 and left to obtain marijuana from two individuals who lived nearby (R. 261, 279). After receiving the marijuana from the petitioner, Jones left the trailer and met with Army investigators. He gave them $5.00 and 5.81 grams of marijuana (R. 280; Prosecution Exhibit 9).

Petitioner was subsequently tried at Fort Benning, Georgia, before a general court-martial composed of officer and enlisted members on January 3 and 9 and February 4, 1982. The court-martial invoked jurisdiction pursuant to Article 2, Uniform Code of Military Justice, 10 U.S.C. § 802. Petitioner's offenses were charged as violations of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934.

Prior to receipt of petitioner's pleas at trial, the government moved *in limine* to prevent the defense from using extrinsic evidence to attack the credibility of Jones, the confidential informant (R. 149). Defense counsel responded that his investigation of Jones revealed a systematic diversion of drugs and Army investigative funds by Jones during the time he served as an informant (R. 150). Counsel asserted that independent evidence of this specific misconduct would be pertinent to show Jones' bias and motive to distort facts, which in turn bolstered an agency defense to the alleged sales (R. 150, 151).[1] The military trial judge granted the government's motion and limited the defense to cross-examination of Jones (R. 154).

When the defense counsel, on cross-examination, questioned Jones about his misconduct, Jones invoked his

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[1] United States v. Fruscella, 21 U.S.C.M.A. 26, 44 C.M.R. 80 (1971) ("[O]ne who acts solely as a procuring agent for a person is not a seller to that person."). However, military law on agency has changed since petitioner was tried. *See* United States v. Power, 20 M.J. 275 (CMA 1985).

right against self-incrimination (R. 298, 299). The military judge denied defense counsel's motion to strike Jones' direct testimony (R. 301) on the basis that Jones' misconduct was collateral to that testimony and to the issues at trial (R. 303).

The issue granted by the United States Court of Military Appeals, as a prerequisite to this Court's jurisdiction, was as follows:

> WHETHER THE MILITARY JUDGE ERRED BY REFUSING TO ALLOW THE DEFENSE TO PRESENT EXTRINSIC EVIDENCE OF THE CONFIDENTIAL INFORMANT'S INVOLVEMENT IN A SYSTEMATIC LARCENY OF THE FUNDS USED IN CONTROLLED PURCHASES OF MARIJUANA AND THE MARIJUANA OBTAINED IN THOSE PURCHASES.

REASONS FOR GRANTING THE WRIT

I. The Trial Court's Rulings on Extrinsic Evidence and the Motion to Strike Jones' Direct Testimony Deprived Petitioner of Any Meaningful Opportunity to Confront and Impeach the Key Government Witness.

At trial, defense counsel presented a detailed, focused argument in support of the admissibility of extrinsic evidence of motive and bias. Defense counsel fully apprised the military judge of the general nature of the evidence and its relevance to show Jones' motive to conceal his own unlawful conduct by slanting his testimony against petitioner. In essence, defense counsel presented his entire strategy regarding an agency defense to the alleged sale of drugs and the impeachment of Jones. The trial judge, however, fundamentally misunderstood the defense's intention to show that Jones' direct testimony would be inherently suspect because Jones had *specific* reasons to slant his testimony against petitioner to protect himself, and not because Jones was generally untrustworthy. Given the evidence discovered during his investigation, defense counsel reasonably expected Jones

to maintain his silence about the unlawful diversions of drugs and money. His purpose in producing extrinsic evidence of these activities was to provide for that contingency and preserve an avenue of impeachment.

The trial judge, however, believed that the prospective defense evidence of specific misconduct impinged only on Jones' general character for truthfulness, and thus would amount to needless litigation of a collateral issue. The magnitude of this error was not apparent until Jones, as expected, invoked his right against self-incrimination on precisely those questions which would have exposed his motive to slant testimony at petitioner's expense. At this point petitioner was left with no avenue to put this highly relevant evidence before the jury members, and thus lost his chance to test the truth of Jones' direct testimony. When the trial judge ruled once again that this area of inquiry was merely collateral, and refused to strike Jones' direct testimony, he effectively immunized Jones from any type of defense challenge to his corrupt motives in testifying against petitioner. The remaining cross-examination of Jones and the other evidence developed by petitioner was unremarkable in its impeachment impact on Jones' testimony.

The United States Court of Military Appeals properly concluded that the proposed extrinsic evidence was a specific and not a general attack on Jones' direct testimony, and thus not subject to the limits imposed by the trial judge. The court did not, however, consider the issue of the denial of petitioner's right to present defense witnesses in conjunction with the subsequent refusal to strike Jones' untested direct testimony.

II. The Trial Court's Rulings Denied Petitioner His Substantial Constitutional Rights to Confront Adverse Witnesses, to Present Witnesses in His Own Defense, and to a Fair Trial.

This Court has recognized that "the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the [govern-

ment's] accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Indeed, the predicament faced by the defendant in *Chambers* is strikingly similar to that which developed in petitioner's case, even if the legal underpinnings differ. In both cases the defense case was far less persuasive than it would have been had the defendant been able to effectively cross-examine a key government witness or present witnesses to expose contradiction or bias in the testimony of that witness.

Other cases which more closely approximate the legal posture of petitioner's case have similarly found error of constitutional dimension. *See, e.g., Johnson v. Brewer*, 521 F.2d 556 (8th Cir. 1975) (denial of extrinsic bias evidence to impeach paid confidential informant held violative of due process); *Steinmark v. Parratt*, 427 F. Supp. 931 (D. Neb. 1977) (denial of bias cross-examination and extrinsic impeachment evidence as to confidential informant cumulatively denied accused due process, citing *Chambers, supra*); and *Jackson v. State*, 695 P.2d 227 (Alaska App. 1985) (limited opportunity to introduce extrinsic impeaching evidence did not alleviate denial of confrontation which occurred when codefendant invoked his right against self-incrimination when cross-examined about his bias). This Court has attached great importance to evidence of bias and motive to testify falsely, and the substantial need for full and effective cross-examination to expose these factors. *Davis v. Alaska*, 415 U.S. 308 (1974); *Alford v. United States*, 282 U.S. 687 (1931). As this Court stated in *Davis*, "[w]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." (Citations omitted). *Davis v. Alaska, supra* at 316-317. Thus, petitioner suffered constitutional depriva-

tion when Jones was permitted to invoke his Fifth Amendment rights and conceal facts material to his motivation in testifying, under an erroneous analysis that these matters affecting bias and motive were "collateral." [2]

However, denial of petitioner's right to confrontation is not based on the lack of cross-examination alone. The cross-examination error is inextricably intertwined with the order *in limine* prohibiting the defense from producing extrinsic evidence of Jones' misconduct. The exclusion of important defense witnesses may constitute constitutional error in its own right. *See Johnson v. Brewer* and *Steinmark v. Parratt*, both *supra*; *United States ex rel. Enoch v. Hartigan*, 768 F.2d 161 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1281 (1986); and *United States v. Davis*, 639 F.2d 239 (5th Cir. 1981). In light of the failure to obtain the impeaching information directly from Jones, the witnesses sought by petitioner were the only remaining sources of impeaching evidence he could present to the fact-finder. The errors in petitioner's case are constitutional errors even if considered separately. When considered together, they constitute substantial constitutional error.

III. The Harmless-Error Rule of *Chapman v. California* Cannot Be Used to Sustain the Actions of the Courts Below.

Petitioner asserts that the denial of his rights to confront the primary adverse witness and to present defense witnesses "would be constitutional error of the first

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[2] While not directly on point, this Court's decision in Delaware v. Van Arsdall, 54 U.S.L.W. 4347 (1986), underscores the constitutional implications of a denial of cross-examination into bias and motive to slant testimony. The fact that the denial of confrontation in the instant case was caused by the witness' silence and not the trial judge's ruling does not alter the ultimate inability of petitioner to test the truth of Jones' direct testimony.

magnitude and no amount of showing of want of prejudice would cure it." *Davis v. Alaska*, *supra*, 415 U.S. at 318 (citations omitted). However, even if the harmless-error analysis of *Chapman v. California*, 386 U.S. 18 (1967), must be applied, proper consideration of the exclusion of defense witnesses and the lack of effective cross-examination yields the same result.

Because the government relied on Jones to handle its funds and to make covert purchases of drugs, he was the essential government witness. His status as an informant approximates that of the informants in *Johnson v. Brewer*, *United States v. Davis*, and *Steinmark v. Parratt*, all *supra*. If Jones did in fact profit from his role as a confidential informant, it would be to his pecuniary advantage to continue to provide incriminating testimony for the military authorities. Jones also had a motive to lie in order to conceal his own misconduct.

More specifically, the evidence of Jones' misconduct was directly relevant to petitioner's defense of agency. As the court below observed, other evidence corroborated the likely diversion of $5.00 and the discrepancy concerning the amount of marijuna received by Jones. However, the other evidence by itself would do nothing but confuse the jury; it had no way to determine whether the discrepancies resulted from falsified testimony or innocent errors in perception. Had the jury understood *why* these discrepancies occurred (*cf. Davis v. Alaska*, *supra* at 318), they would undoubtedly have accepted the discrepancies as fact and examined petitioner's profit motive more critically. With the evidence that petitioner lost money on the September 30 transaction (R. 209-210), petitioner's agency defense is noticeably enhanced and more squarely rebuts what the court below viewed as "damning evidence" of petitioner's profit motive. *United States v. Hunter*, 21 M.J. 240, 243 (CMA 1986) (Appendix A).

Finally, the evidence of Jones' profit-making scheme and his corrupt motive to testify falsely may have called into question the truthfulness of *all* of Jones' testimony. What is crucial in this case, however, is the fact that *none* of Jones' testimony was subject to effective impeachment. The trial court's decision to deny the admission of extrinsic evidence and the lack of effective cross-examination completely immunized Jones from impeachment by the only effective means available. A conclusion that the constitutional errors committed are nonetheless harmless misapplies this Court's precedents to a fact situation certain to recur as long as unsavory informants are used by the government.[3] Even if the court below could validly concern itself with the relative strengths of the defense and prosecution cases, it cannot ignore the material effect on the defense case of trial court rulings which effectively eliminated petitioner's ability to defend himself by confronting his accuser. It is not within the trial judge's discretion to measure the strength of the defense case and the degree to which the proffered evidence of bias and motive will help it. The trial judge must safeguard the accused's rights by allowing the jury to hear all available, relevant evidence and give it due consideration in finding the facts. *Compare Davis v. Alaska, supra* at 317; *Johnson v. Brewer, supra* at 563.

CONCLUSION

The cumulative effect of the trial judge's rulings was to completely deprive petitioner of any opportunity to demonstrate that the prosecution's principal witness had

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[3] Furthermore, the analysis of the court below is not consistent with its own precedents. In United States v. Remai, 19 M.J. 229 (CMA 1985), the United States Court of Military Appeals adopted the harmless-error analysis of Chapman v. California, *supra*, in a case involving an illegally-obtained confession. In this case, however, the court below made no mention of United States v. Remai, *supra*, and also failed to consider the constitutional implications of the errors in petitioner's case.

a motive to misrepresent the facts in order to conceal his own misconduct. These rulings, as well as the decision of the United States Court of Military Appeals, fail to accommodate the substantial rights of the petitioner to adequately confront the witnesses against him and to be accorded a fair trial consistent with due process of law. The actions of the courts below are contrary to established precedents of this Court and the inferior federal courts. The question presented is substantial and significant to military and civilian jurisprudence since it involves fundamental constitutional rights. Accordingly, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 48,680

CM 442637

UNITED STATES,

Appellee,

v.

JEFFREY R. HUNTER, Private First Class, U.S. Army,

Appellant,

Jan. 27, 1986

For Appellant: *Captain J. Andrew Jackson* (argued); *Colonel William G. Eckhardt, Lieutenant Colonel William P. Heaston, Major Edwin D. Selby, Captain Donna Chapin Maizel, Captain Gunther O. Carrle* (on brief); *Colonel Brooks B. La Grua* and *Captain H. Alan Pell.*

For Appellee: *Captain Samuel J. Rob* (argued); *Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Lieutenant Colonel Thomas M. Curtis* (on brief).

Opinion of the Court

COX, Judge:

This case, 17 M.J. 738,[1] arose out of a typical drug investigation by the Criminal Investigation Division

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[1] A general court-martial composed of officer and enlisted members tried appellant at Fort Benning, Georgia, during January and

(CID). A confidential informant, Specialist Four Paul Jones, gained the confidence of appellant and his roommate, Specialist Four Timothy Browning. When Jones approached Browning about buying some marihuana, he was referred to appellant. Appellant eventually made two sales of marihuana to Jones, one on September 30 of what purported to be one ounce and one on October 4 of what purported to be a "dime" bag.

In the face of overwhelming evidence that he possessed and transferred marihuana on the two occasions as alleged, appellant defended on the basis that he did not make a profit and was merely a procuring agent for Jones at the request of Browning and, thus, could not be found guilty of sale.[2] Based primarily on the testimony of Browning, who was granted immunity, the Government contended that appellant made a profit on the transactions by receiving a discount from his regular supplier and that he should be found guilty of sale.

Two evidentiary rulings at trial gave rise to the granted issues. We will discuss these separately.

February, 1982. Contrary to his pleas, he was convicted of two specifications each of possession, transfer, and sale of marihuana, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. He was sentenced to confinement at hard labor for 10 years, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. The convening authority reduced the confinement to 6 years but otherwise approved the sentence as adjudged. The Court of Military Review affirmed. 17 M.J. 738 (1983).

[2] As the defense of agency applies only to a sale offense, *United States v. Fruscella*, 21 U.S.C.M.A. 26, 44 C.M.R. 80 (1971), it is not applicable to the offense of distribution of controlled substances in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.

I

WHETHER THE MILITARY JUDGE ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY PERMITTING THE COURT MEMBERS TO HEAR EVIDENCE OF UNCHARGED MISCONDUCT RELATING TO, AMONG OTHER THINGS, APPELLANT'S PRIOR INVOLVEMENT WITH MARIHUANA.

Appellant argues that the military judge committed prejudicial error by permitting trial counsel, over defense objection, to introduce evidence of uncharged misconduct.[3] We disagree. Although evidence of prior acts of misconduct was inadmissible under Mil.R.Evid. 404(a) for the purpose of showing appellant's bad character, that does not stand in the way of its admissibility for other purposes. *See* 1A Wigmore, *Evidence* § 215 (Tillers rev. 1983). The evidence of uncharged misconduct was admissible in this case to show appellant's intent and motive to rebut the defenses of entrapment and agency. Mil.R.Evid. 404(b).

The testimony that the inducement for the offenses originated with the government informant arguably raised the defense of entrapment.[4] Once the defense is

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[3] The evidence included testimony that appellant had sold marihuana to a Specialist Hornbrook several times before the date of the first meeting between appellant and Jones. Also included was the testimony of Browning that appellant would only sell drugs to someone he knew personally, had "gotten high" with, or for whom Browning vouched. All of this evidence was introduced by trial counsel to overcome any inference that appellant had been entrapped.

[4] The military judge instructed the members on the defenses of agency and entrapment. When the evidence, whether produced by the defense or by the Government, raises a defense, it is not error to so instruct the factfinders, regardless of defense theories or requests. *United States v. Sermons*, 14 M.J. 350 (C.M.A. 1982); *United States v. Steinruck*, 11 M.J. 322 (C.M.A. 1981). Although defense counsel stated that any defense of entrapment was "spe-

raised, the Government may then introduce evidence of predisposition, including evidence of prior misconduct, to rebut that defense. *United States v. Vanzandt*, 14 M.J. 332, 343 (C.M.A.1982). *Cf. United States v. Brannan*, 18 M.J. 181 (C.M.A.1984) (evidence of prior drug transactions relevant to rebut defense of lack of criminal intent). The evidence of prior marihuana sales was clearly probative of appellant's predisposition to sell marihuana.

Evidence of prior misconduct was also admissible in this case to rebut the defense theory of agency. *See United States v. Skrzek*, 47 C.M.R. 314 (A.C.M.R.1973). The agency defense is available if an accused acts as an agent solely for the purchaser and not for the seller. *United States v. Suter*, 21 U.S.C.M.A. 510, 45 C.M.R. 284 (1972). Evidence of other drug sales was admissible to show that appellant's motive or plan was to serve his own interests, rather than merely to accommodate Jones. Mil. R.Evid. 404(b).

II

WHETHER THE MILITARY JUDGE ERRED BY REFUSING TO ALLOW THE DEFENSE TO PRESENT EXTRINSIC EVIDENCE OF THE CONFIDENTIAL INFORMANT'S INVOLVEMENT IN A SYSTEMATIC LARCENY OF THE FUNDS USED IN CONTROLLED PURCHASES OF MARIHUANA AND THE MARIHUANA OBTAINED IN THOSE PURCHASES.

Trial counsel moved to preclude appellant from attempting to impeach the informant, Jones, by proving

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cifically and consciously" waived, he elicited in cross-examination of Jones and Browning that appellant did not want to sell to Jones, that Jones aggressively and persistently solicited appellant, and that appellant refused several times before reluctantly agreeing to obtain marihuana for Jones.

specific acts of misconduct by extrinsic evidence.[5] Appellant contended this evidence was admissible under Mil. R.Evid. 608(c) to show bias and a motive "to put the competition out of business." The military judge ruled that appellant was limited to cross-examination of Jones concerning the alleged acts of misconduct.

Although extrinsic evidence of misconduct is not admissible to show a witness' general character for truthfulness, it is admissible to impeach a witness by showing "[b]ias, prejudice, or any [other] motive" of the witness "to misrepresent." Mil.R.Evid. 608(c); *United States v. Banker*, 15 M.J. 207 (C.M.A.1983). See 3A Wigmore, *Evidence* § 943 (Chadbourn rev. 1970). "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *United States v. Abel*, —— U.S. ——, 105 S.Ct. 465, 469, 83 L.Ed.2d 450 (1984).

Appellant's theory that Jones had a motive to misrepresent in order to eliminate a competing drug dealer was so tenuous that extrinsic evidence offered to support it was properly excluded. *Cf. United States v. Gonzalez*, 16 M.J. 423 (C.M.A.1983). Even if Jones were selling drugs, it does not follow that it might lead him to color his testimony against appellant.

There is some merit, however, to appellant's argument that evidence of a practice by Jones of diverting CID funds or drugs was relevant to the defense theory of agency. That Jones had previously retained some of the marihuana or funds from other transactions would lend support to the inference that Jones had diverted some

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[5] Defense counsel wanted to introduce testimony that Jones was using his position as a CID informant to divert drugs and money. The defense also wanted to show that Jones was selling drugs at the stockade.

of the marihuana or funds to his own use in this case, leading him to slant his testimony against appellant to conceal his own misconduct. Although Jones testified that he gave appellant $45 for an ounce of marihuana, the defense theory was that appellant made no profit on the transactions, transferring a $40-bag of marihuana to Jones for $40 and transferring a $10-bag for $10. Therefore, the evidence of a systematic diversion of funds and drugs was sufficiently probative of Jones' possible motive to misrepresent to warrant its admission into evidence.

Appellant was not prejudiced, however, by the exclusion of this extrinsic evidence. Article 59(a), Uniform Code of Military Justice, 10 U.S.C. § 859(a). *See United States v. Weeks*, 20 M.J. 22 (C.M.A.1985). The case against appellant was strong and the defense theory of the case was weak. In any event, other evidence before the members suggested that Jones had skimmed $5 and a few grams of marihuana from the September 30 transaction. Further, the materiality of the proffered evidence was seriously diminished by the evidence of a wholesale profit motive. Whether appellant actually received $40 or $45 from Jones, or whether Jones actually received 23 or 28 grams of marihuana, did nothing to refute the damning evidence provided by appellant's partner-in-crime that their anticipated profit was to come from receiving a volume discount from their supplier. After a careful review of the entire record of trial, we are convinced that any error was harmless beyond a reasonable doubt.

The decision of the United States Army Court of Military Review is affirmed.

Chief Judge EVERETT concurs.

APPENDIX B

U.S. ARMY COURT OF MILITARY REVIEW

CM 442637

UNITED STATES,
Appellee,

v.

PRIVATE FIRST CLASS JEFFREY R. HUNTER,
SSN 369-72-3214, United States Army,
Appellant.

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23 Nov. 1983

Colonel William G. Eckhardt, JAGC, Major Lawrence F. Klar, JAGC, Captain Gunther O. Carrle, JAGC, and Ted A. Schumacher, Esquire, were on the pleadings for the appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel John T. Edwards, JAGC, Lieutenant Colonel Thomas M. Curtis, JAGC, and Captain Arthur L. Passar, JAGC, were on the pleadings for the appellee.

Before MOUNTS, YAWN and WERNER, Appellate Military Judges.

OPINION OF THE COURT

WERNER, Judge:

Contrary to his pleas, appellant was convicted of two specifications each of wrongful sale, transfer and possession of marijuana, in violation of Article 134, Uniform

Code of Military Justice, 10 U.S.C. § 934. A court composed of members sentenced him to a dishonorable discharge, confinement at hard labor for ten years, total forfeitures and reduction to the grade of Private E-1. The convening authority reduced the period of confinement to six years but otherwise approved the sentence as adjudged.

Of the assignments of error raised by appellant, only three warrant comment. Each arises out of the testimony of a confidential informant, Specialist Four Jones, who played a crucial role in the transactions which underlie the charged offenses. Specifically, appellant contends that the military judge erred by refusing to permit the defense to attack the informant's credibility with extrinsic evidence of bias, prejudice or motive to misrepresent; denying the defense access to a Government file on the informant; and refusing to strike the informant's testimony after he had asserted his right against self-incrimination as to certain cross-examination questions. For the reasons set forth below, we find appellant's assignments of error without merit.

Reduced to its essentials, the voluminous record of this case reveals that, after negotiating a purchase of a small amount of marijuana with appellant and his roommate, Specialist Jones paid appellant $45.00 in marked currency in anticipation of later delivery of the drugs. Five days later, appellant and his roommate delivered the marijuana to Jones at their apartment. Four days after that, Jones returned to the apartment where he purchased marijuana from appellant for $10.00 in marked currency.

I. *The Military Judge's Refusal to Permit Extrinsic Evidence of Bias, Prejudice or Motive to Misrepresent.*

The Government moved *in limine* that appellant be prevented from cross-examining Specialist Four Jones and from presenting evidence which would show that "Jones

was engaged in a systematic diversion of drugs and CID funds." In response, appellant claimed that evidence of Jones' activities was admissible to prove Jones' bias or motive to fabricate his testimony so he could eliminate competing drug dealers. The military judge granted the Government's motion on the rationale that any such evidence elicited or presented by appellant would cause confusion of the issues in the case. *See* Military Rules of Evidence 403 and 608(b). We hold that the military judge was correct albeit for a different reason. Resolution of this issue is governed by Military Rule of Evidence 608(c), and depends on whether appellant, in his offer of proof, sufficiently established that Jones' alleged illicit activities rendered his testimony suspect of fabrication for bias, prejudice or motive to misrepresent. We find that the defense did not meet its threshold burden in this regard. As we read the trial defense counsel's offer of proof, we perceive nothing more than the bare assertion that because Jones was a drug dealer and a thief, it automatically follows that his testimony possesses "a hostility of emotion or partiality of mind . . . from which the factfinder can infer that [his] testimony is distorted." *United States v. Banker*, 15 M.J. 207, 210 (C.M.A. 1983) (citation omitted). We find such an assertion to be untenable under the circumstances of this case and accordingly reject it. *See United States v. Gonzalez*, 16 M.J. 423 (C.M.A. 1983).

II. *The Military Judge's Denial of Defense Access to the CID File.*

Claiming he was in pursuit of exculpatory or impeachment evidence, appellant moved for production of the file maintained on Specialist Jones' informant activities by the Criminal Investigation Division. The Government produced the file in court, presented it to the military judge for an *in camera* inspection, and opposed its delivery to appellant on the grounds, *inter alia*, it contained nothing relevant to appellant's case and appellant was

embarked on little more than a fishing expedition. The military judge examined the file and denied appellant's motion. We hold his action was proper. We find, as did the military judge, that the information in the file amounted, at best, only to extrinsic evidence of Jones' alleged drug dealings and diversion of Government funds and, as such, was not admissible for the purpose of attacking his credibility. *See* Mil.R.Evid. 608(b). Moreover, the military judge determined, and we agree, that the information would not have helped the defense. Therefore, we hold it was not error to deny appellant access to the file.

III. *The Military Judge's Refusal to Strike the Confidential Informant's Testimony.*

During his cross-examination of Specialist Jones, the trial defense counsel asked Jones whether he had sold drugs before 24 September 1981. When Jones replied that he had not, appellant's counsel pursued a line of questioning which implied that Jones had been selling drugs to prisoners at the stockade. Jones refused to answer some of the questions by invoking his right against self-incrimination. Appellant moved to strike Jones' entire testimony pursuant to Military Rule of Evidence 301(f)(2), which provides for such action "unless the matters to which the witness refuses to testify are purely collateral." The military judge determined they were collateral and so do we. Accordingly, we see no reason to disturb his ruling. *See United States v. Williams*, 16 M.J. 333 (C.M.A. 1983); *United States v. Richardson*, 15 M.J. 41 (C.M.A. 1983); *United States v. Hornbrook*, 14 M.J. 663 (A.C.M.R. 1982), *aff'd*, 16 M.J. 195 (C.M.A. 1983) (summary disposition).

The findings of guilty and the sentence are affirmed.

Senior Judge MOUNTS and Judge YAWN concur.

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